IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIER1 INNOVATION, LLC,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
EXPERT TECHNOLOGY GROUP, LP	:	
and EXPERT TECHNOLOGY	:	NO. 06-cv-04622
ASSOCIATES, LLC,	:	
Defendants.	:	

MEMORANDUM AND ORDER

JACOB P. HART May 8, 2007
UNITED STATES MAGISTRATE JUDGE

I. Procedural and Factual Background

Plaintiff, Tier1 Innovation, LLC ("Tier1), brought the instant action against defendants, Expert Technology Group, L.P. and Expert Technology Associates, LLC ("Defendants" or "ETA") for breach of contract. Plaintiff alleges that on December 30, 2005 the parties entered into a Professional Services Agreement, wherein ETA agreed to provide and Tier1 agreed to pay for services as described in a Statement of Work executed on that same date, and that ETA breached the contract by failing to make payments in accordance with the Professional Services Agreement. The services to be provided by Tier1 involved the implementation and configuration of computer software (Siebel Service 7.8) to be used by ETA.

On August 31, 2006, Plaintiff commenced this action by filing a Complaint in the District Court in Denver, Colorado. On September 19, 2006, the action was removed to the United States District Court for the District of Colorado and was then transferred to the United States District Court for the Eastern District of Pennsylvania on October 5, 2006. On January 10, 2007,

Plaintiff filed an Amended Complaint and on January 22, 2007, ETA filed an Answer with Affirmative Defenses and Counterclaim, asserting causes of action for fraud, negligent misrepresentation, and breach of contract.

Currently pending before the Court is Plaintiff, Tier1's Motion pursuant to Rule 12(b)(6) to dismiss Counts I and II of Defendants' Counterclaim. Specifically, Plaintiff argues that Counts I (fraud) and II (negligent misrepresentation) of ETA's Counterclaim are barred by the "Gist of the Action Doctrine" and "Economic Loss Rule", barring tort recovery for breaches of contracts. In the alternative, Plaintiff moves for a more definite statement regarding Counts I and II under Rule 12(e) of the Federal Rules of Civil Procedure, as Plaintiff argues that the claims as pled do not comply with Federal Rule of Civil Procedure 9(b). For the reasons that follow, the Court will grant Plaintiff's 12(b)(6) motion and will dismiss Counts I and II of the Counterclaim.

II. Standard of Review

A claim may be dismissed under Fed. R. Civ. Pr. 12(b)(6) only if it appears beyond doubt that the plaintiff could prove no set of facts in support of her claim that would entitle her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). Moreover, the court must consider only those facts alleged in the complaint, and accept all factual allegations as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); ALA, Inc. v. CCAIR, Inc., 29 F.3d 885, 859 (3d Cir. 1994). When reviewing a 12(b)(6) motion, the Court must provide the plaintiff with the benefit of all inferences that may be fairly drawn from the contents of the complaint. Nami v. Fauver, 82 F.3d 63, 64 (3d Cir. 1996); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir.1993). A court's inquiry into the legal sufficiency of a plaintiff's pleadings, under 12(b)(6), is limited to considering "not whether plaintiff will ultimately prevail but

whether the claimant is entitled to offer evidence to support [her] claims." Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974)).

III. Discussion

Plaintiff asserts that Counts I (Fraud) and II (Negligent Misrepresentation) of ETA's Counterclaim must be dismissed under the gist of the action doctrine and the economic loss rule. The purpose of both is "maintaining the separate spheres of the law of contract and tort." Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc., 246 F. Supp. 2d 394, 402 (E.D. Pa.2002). In the alternative, Plaintiff seeks a more definite statement of Counts I and II, as Plaintiff alleges that the pleadings do not comply with the requirements of Rule 9(b). Since we agree that Counts I and II of ETA's Counterclaim are barred by the gist of the action doctrine[1], we need not discuss the application of the economic loss rule or Rule 9(b).

Although the Pennsylvania Supreme Court has not adopted the gist of the action doctrine, both the Pennsylvania Superior Court and the federal courts, including the Third Circuit, have repeatedly predicted that it will and have applied the doctrine. KSM Assoc., Inc. v. ACS State Healthcare, LLC, 2006 WL 847786 (March 30, 2006 E.D. Pa.) (Schiller, J.) (citing Air Prods.

[1]The choice of law provision in the Agreement provides that "[t]his Agreement shall be governed by and interpreted in accordance with the laws of the State of Colorado...". However, this provision does not mandate that Colorado law should be used to examine the validity of ETA's tort claims. As Tier1 has argued and ETA has not disputed, it is appropriate to apply Pennsylvania's gist of the action doctrine. Since the choice of law provision of the Agreement does not govern, it is appropriate to apply Pennsylvania's choice of law provisions. See Owen J. Roberts Sch. Dist. v. HTE, Inc., 2003 WL 735098 n.4 (E.D. Pa. Feb. 28, 2003) (Dalzell, J.). After a review of the law, it is apparent that Colorado does not apply the gist of the action doctrine to fraud and misrepresentation claims, thereby creating a "true" conflict between the two states' policies and interests. See Bridgewater Apartments, LLC v. 6401 S. Boston Street, Inc., 2006 WL 295385 (D. Colo. February 7, 2006) (holding that claims of fraud and misrepresentation exist independently from claims for breach of contract). Therefore, giving weight to the place (Pennsylvania) where the alleged misrepresentations were made and where any action by the defendants in reliance on those representations was taken, Pennsylvania law must be applied. See Coram Health Care Corp. v. Aetna U.S. Healthcare, 94 F. Supp. 2d 589, 594 (E.D. Pa. 1999).

and Chems., Inc. v. Eaton Metal Prods. Co., 256 F. Supp. 2d 329, 340 (referring to Asbury Auto Group LLC v. Chrysler Ins. Co., Civ. A. No. 01-3319, 2002 WL 15925 at *3 n.3 (E.D. Pa. 2002); Caudill Seed & Warehouse Co. Inc. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833 n.11 (E.D. Pa 2000); eToll, Inc. v. Elias/Savion Adv. Inc., 811 A.2d 10, 14 (Pa. Super. 2002); Bash v. Bell Tel. Co. of Pa., 601 A.2d 825, 829 (Pa. Super. 1992)). Pennsylvania's gist of the action doctrine prevents plaintiffs from recovering on a separate tort claim which simply restates a claim for breach of contract. Werwinski v. Ford Motor Co., 286 F.3d 661, 680 n.3 (3d Cir. 2002).

Until its decision in eToll, the Pennsylvania Superior Court had not yet addressed the question of whether the gist of the action doctrine applies to preclude claims of fraud. Air Products and Chemicals, Inc. v. Eaton Metal, 256 F. Supp. 2d at 341 (citing eToll, 811 A2d. at 15-19). After examining state and federal case law regarding the doctrine, the Superior Court held that an automatic exception does not exist for claims of fraud arising out of breach of contract claims. Id. Rather, the determination is based upon "the individual circumstances and allegations of the plaintiff." eToll, 811 A.2d at 17. The court must determine whether the source of the duties breached were "interwtined" with obligations under the contract, or if they were merely collateral. Sunburst Paper, LLC v. Keating Fibre Internat'l, Inc., 2006 WL 3097771 (Oct. 30, 2006 E.D. Pa.) (Padova, J.) (citing Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999)). The Pennsylvania Superior Court explained the distinction as follows: "Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." eToll, 811 A.2d at 14 (citing Bash v. Bell Tel. Co., 601 A.2d 825, 829 (Pa. Super.1992)).

Here, ETA argues that its claims are collateral to the contract because they involve fraud/misrepresentation in the inducement and therefore the events predated the actual contract. As ETA argues, the courts have in some cases at least inferred that there may be a distinction between claims of fraud and claims of fraud in the inducement to contract. See Advanced Tubular Prods. v. Solar Atmospheres, Inc., 149 Fed. Appx. 81, 85 (3d Cir. 2005) ("Pennsylvania courts have recognized that the gist of the action doctrine may not cover fraud in the inducement."); eToll, 811 A.2d at 17 ("[F]raud in the inducement of a contract would not necessarily be covered by [the gist of the action] doctrine because fraud to induce a person to enter into a contract is generally collateral to (i.e., not 'interwoven' with) the terms of the contract itself."). However, while it is true that the gist of the action doctrine will not bar all fraud in the inducement claims, "the particular theory of fraud- whether it lies in inducement or performance - is not dispositive." Guy Chemical Co., Inc. v. Romaco N.V, 2007 WL 184782 (W.D. Pa. Jan 22, 2007) at *5-6; See also Owen J. Roberts Sch. Dist. v. HTE, Inc., 2003 WL 735098 n.4 (E.D. Pa. Feb. 28, 2003) (Dalzell, J.) (applying the gist of the action doctrine to a fraud in the inducement claim where the pre-contractual statements regarding ability to supply software in a timely manner were ultimately addressed in the contract); Galdieri v. Monsanto Co., 245 F. Supp. 2d 636, 650 (E.D. Pa. 2002) (dismissing the plaintiff's fraudulent inducement claim under the gist of the action doctrine where the alleged fraud was that the defendant never intended to perform). Rather, the test to be applied to claims of fraud in the inducement remains the same as that set forth in eToll. Id. A tort claim is barred by the gist of the action doctrine if: (1) it arises solely from a contract between the parties; (2) the duties allegedly breached were created and grounded in the contract itself; (3) the liability stems from a contract; or (4) the tort

claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. Williams v. Hilton Group, PLC, 261 F. Supp. 2d 324, 327-28 (E.D. Pa. 2003) (citing eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 19 (Pa. Super. 2002)).

We acknowledge, as ETA argues, that we must exercise caution in making a determination regarding the gist of the action at this early stage of the case. See Weber Display and Packaging v. Providence Washington Insurance Co., 2003 WL 329141 (E.D. Pa. Feb. 10, 2003) (Buckwalter, J.). However, as was the case in KSM Assoc., 2006 WL 847786, it is evident here that ETA's claims of fraud and negligent misrepresentation are based in contract.

Among the allegations made by ETA in its affirmative defenses to Plaintiff's breach of contract claim is that "plaintiff fraudulently represented its experience and abilities with regard to the implementation of the Siebel application under this contract" and that "plaintiff failed to provide the agreed upon consideration, ability, experience and timely implementation of the Siebel application under this contract." (pars. 22-23.) Count One of ETA's Counterclaim, alleging fraud, provides that "Plaintiff made representations regarding its ability and experience that were untrue at the time those representations were made." ETA further alleges that it relied to its detriment upon "plaintiff's representations regarding plaintiff's abilities and experience at implementing the Siebel software" and that "plaintiff knew that ETA was relying on those representations and knew that it did not have sufficient knowledge or experience to perform the functions agreed upon under the contract." (ETA's Counterclaim - Count I - pars. 9-11). Similarly, in Count II (Negligent Misrepresentation), ETA alleges that "plaintiff did not have the requisite experience and knowledge to implement the Siebel software" and "plaintiff failed to

exercise the appropriate level of due care in advising ETA of its knowledge and expertise and in estimating both the time and expense necessary to implement the Siebel software and/or in failing to exercise the appropriate level of care in implementing the software." (pars. 18-19). Finally, in Count III (Breach of Contract) ETA alleges that "Plaintiff contracted and agreed to provide services in a timely and competent manner" and "Plaintiff failed to provide the services required and to implement the Siebel software application as agreed." (pars. 22-23).

ETA's allegations of fraud and negligent misrepresentation are both "inextricably intertwined" with Tier1's alleged failure to perform under the contract, as the claims pertain to Tier1's representations regarding its expertise and ability to perform its duties under the agreement between the parties. See KSM Assoc., 2006 WL 847786 at *4 (finding fraud in inducement counterclaim barred by the gist of the action doctrine, where the alleged fraud was based on KSM's misrepresentation that it had the "skill, experience and/or personnel" to fulfill its contractual obligations). The Court in KSM, a case very similar to this, held that "this type of misrepresentation, regarding KSM's subjective qualifications and competency to perform the software development services, is inextricably intertwined with KSM's failure to perform under the [contract]." Id. (citing Air Prods & Chems., Inc. v. Eaton Metal Prods., Co., 256 F. Supp.2d at 342). Judge Schiller relied upon Air Products, in which the court had distinguished between subjective and objective qualifications and noted that representations regarding subjective qualifications, including a party's own belief as to its expertise and ability to perform, relate to the failure to perform under the contract between the parties and are therefore barred by the doctrine. Id.; See Air Prods., 256 F. Supp.2d at 342 (finding that objective qualifications such as certifications implicate broader social policies and allowing claims for both breach of contract

and fraud in inducement where claim involved a misrepresentation regarding a license required by law)[2].

Here, the entire basis for ETA's claims of fraud and negligent misrepresentation both involve solely Tier1's representations regarding its abilities and experience to implement the software as agreed upon in the contract between the parties. We therefore cannot find the contract to be merely collateral, but find that the contract is at the heart of the fraud and negligent misrepresentation claims. Accordingly, the claims are barred by the gist of the action doctrine and the Court grants Tier1's motion to dismiss Counts I and II of ETA's Counterclaim.

An appropriate Order follows.

[2]ETA does not allege that any of the alleged misrepresentations regarding Tier1's qualifications involve certifications or their lack thereof. However, even if ETA had made such an allegation, the claim would still be barred by the gist of the action doctrine. First, we note that an important distinction must be made between a certification required by law, as was the case in Air Products, and one which merely demonstrates training in computer software. In Air Products the court noted that such certifications were made necessary by law because of safety concerns and therefore implicated broader social policies. Air Prods., 256 F. Supp. 2d at 342. Here, any certifications in this version of software simply relates to Tier1's ability to perform under the contract. Second, such a claim would be barred because the representations were incorporated into the terms of the agreement between the parties. The cover letter from Tier1, enclosing the Time and Material Statement of Work, which is incorporated into the contract, provides that Tier1 has "successfully delivered over 300 Siebel projects, including several Field Service projects, like [ETA's]" and that Tier1 would "assign the best team to [ETA's] project" with "the requisite skills, experience and Siebel 7.8 certifications necessary to deliver [ETA's] project on time and on budget." These representations are contained in the Statement of Work and are therefore incorporated into the terms of the agreement, itself. Accordingly, the representations are not merely collateral to the contract, but are the "gist of the action".

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ASSOCIATES, LLC,	:	
Defendants.	:	

ORDER

AND NOW, this 8th day of May, 2007, upon consideration of Plaintiff, Tier1 Innovation, LLC's Motion to Dismiss and the response thereto, it is hereby ORDERED that the Motion to Dismiss (docket # 19) is GRANTED and Counts I and II of Defendants' Counterclaim are dismissed.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE